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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ALLEN LYONS, Defendant and Appellant.	D070976 (Super. Ct. No. SCD266812)

APPEAL from a judgment of the Superior Court of San Diego County, Michael S. Groch, Judge. Affirmed.

Pauline E. Villanueva, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

Allen Lyons pleaded guilty to felony indecent exposure, and admitted a prior felony indecent exposure offense. The probation department prepared a report showing Lyons has a lengthy criminal history, is at moderate-to-high risk of committing another sexual offense, and has been repeatedly unsuccessful while on probation. With the prosecution's agreement, the court nonetheless granted Lyons three years' formal probation on the condition that he comply with numerous requirements to ensure he will be appropriately supervised and monitored.

On appeal, Lyons challenges several of the probation conditions: (1) an electronics-search Fourth Amendment waiver; (2) the requirement that he abstain from using or possessing alcohol if directed by his probation officer; and (3) submission to drug and/or alcohol tests if required by his probation officer. Lyons contends the conditions are unreasonable under California Supreme Court standards (see *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*)) and/or are constitutionally overbroad.

These contentions are without merit under current California Supreme Court authority and this court's recent decision in *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*). The trial court did not abuse its discretion in concluding the probation conditions are reasonable because they will provide the probation department with the tools to effectively monitor and supervise Lyons and to protect public safety. Additionally, the probation conditions satisfy constitutional standards because the potential infringement on Lyons's privacy rights as a probationer is outweighed by the state's law enforcement needs. In particular, on the electronics-search condition, there are no facts showing Lyons's electronics contain the type of private information requiring

heightened protection or that a search of these devices would be more intrusive than a warrantless search of his home, a condition that Lyons has not challenged on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Background

In April 2016, 68-year-old Lyons exposed his penis and openly masturbated after approaching and staring at a young woman on the trolley. The young woman reported the incident while still on the trolley and officers contacted Lyons at the next stop. Security video confirmed the woman's account. Lyons pleaded guilty to one count of felony indecent exposure. (Pen. Code, § 314, subd. (1).) He admitted he "unlawfully exposed [his] genitals in a public place . . . with the intent of sexual gratification or to annoy others." He also admitted the allegation that he had previously been convicted of an indecent-exposure felony with a prior. The plea contained the prosecution's agreement that it would not oppose local time.

Probation Report

Before sentencing, Lyons met with a probation officer and said he " 'desperately regret[s] putting myself in this situation' " and was "willing to comply with any and all terms and conditions of probation if so granted." He said he is "too old" to be in this environment, and recognized that "[o]ne more incident like this I [will] go through the prison system. . . ." He said he took prescription medications but claimed he had never used illegal drugs. He admitted drinking "socially," but denied that he had ever been drunk or had an issue with alcohol. Lyons has numerous medical problems including

diabetes and high blood pressure, and frequently uses a wheelchair. Lyons denied having any psychological problems or undergoing psychological evaluations.

The probation report identified Lyons's lengthy criminal history, which included convictions for four lewd acts or indecent exposures, theft, battery, and disorderly conduct. Many of the convictions occurred more than 20 years ago. The most recent prior conviction occurred in 2010 for a similar indecent exposure offense on the trolley. After that conviction, Lyons attended a sex-therapy program, but reoffended (the current offense) within two years of completing the program. Lyons has a long history of violating probation conditions. The current probation officer said that Lyons "did not appear to be on probation at the time of his arrest," but "his prior performance on probation was unsatisfactory based on his poor performance while on probation . . . , his failure to remain law abiding, and his continued deviant behavior . . . ."

The probation department evaluated Lyons under the COMPAS assessment tool (Correctional Offender Management Profiling for Alternative Sanctions). The assessment found Lyons was in the "Moderate-High Risk Category for being convicted of another sexual offense, if he is released on probation." The assessment also found he "is likely to be successful with minimal intervention" and that "[i]ntervention at a more intrusive level could prove ineffective or counter-productive based upon available research." But the probation report qualified this conclusion by stressing the importance of developing a case plan and programming to reduce the strong risk of recidivism and to address Lyons's risk factors, including his "cognitive behavior; social isolation; leisure and recreation." The probation report stated: "A case plan will be developed to address

the[se] factors . . . . The case plan will then follow the defendant through any period of jail custody time and then into his mandatory supervision period . . . . This case plan is considered a 'living document' that will be modified throughout the process as defendant's circumstances change and as ongoing assessment occurs."

The probation officer also noted that Lyons is presumptively ineligible for probation because his current offense is a felony and he has two prior felony convictions. (§ 1203, subd. (e)(4).) But the probation officer said the prosecution had agreed it would not oppose local time, and thus the court could grant probation under an applicable exception. (Cal. Rules of Court, rule 4.412.)

The probation officer summarized the case as follows: "The defendant . . . offered an expression of regret; however, his regret was in regards to his current circumstances. At no time did he express any regards for the victim or any other possible witnesses. [¶] The instant offense is one of many in a long line of similar deviant behavior. His prior performance on probation is deemed unsatisfactory in that he has continued to reoffend; many of his offenses are similar in nature. Based on the above, the undersigned heavily considered a prison commitment in this matter. However, in consideration of the plea agreement, it is felt he could still benefit from the resources specific to his behaviors with a grant of formal supervision. Thus, a recommendation for a grant of formal probation with 365 days custody is respectfully submitted. As previously recommended . . . , to reinforce the need for him to cease and desist similar or same behavior, it will be recommended 3 years in state prison be imposed and stayed pending his successful

completion of probation, with the hope the extended period of incarceration may be enough to deter him before possibly reoffending."

The probation officer recommended numerous probation conditions, including a Fourth Amendment search waiver, which stated: "Submit person, vehicle, residence, property, personal effects, *computers, and recordable media* . . . to search at any time with or without a warrant, and with or without reasonable cause, when required by [the probation officer] or law enforcement officer." (Italics added.) Other proposed probation conditions required Lyons to: (1) register as a sex offender under Penal Code section 290; (2) seek and maintain full-time employment or schooling; (3) successfully complete a sex-offender counseling program; (4) participate in cognitive behavior treatment, therapy, and counseling; (5) provide written authorization for the probation officer to receive progress and compliance reports from any medical/mental-health provider or other treatment provider; (6) report any changes in address or employment to the probation officer; and (7) not own, transport, sell, or possess various types of weapons. Although the probation officer apparently intended to do so, it is unclear from the record whether he also marked the probation-condition boxes pertaining to prohibitions on alcohol and illegal-drug use, and related drug/alcohol testing requirements.

Sentencing Hearing

At the outset of the sentencing hearing, defense counsel said Lyons agreed with the probation department's recommendations, "as they follow what we had discussed on this case." As to the probation conditions, counsel said Lyons objected to the Fourth Amendment waiver condition. Defense counsel noted that Lyons had not used an

electronic device or any contraband in connection with the indecent exposure crime. With defense counsel's agreement, the court incorporated counsel's argument made earlier that day in a different defendant's case involving the same probation condition. In that argument (of which we have taken judicial notice), defense counsel asserted that a nexus between the crime and the electronics was required before the government could impose a probation condition allowing a warrantless search of a probationer's cell phone.

In his argument, the prosecutor stated the district attorney's office and the probation department had only reluctantly agreed to recommend probation rather than a prison sentence, noting "it was borderline . . . based on [Lyons's] prior record and . . . prior performance on probation." The prosecutor said: "[T]he People are not incredibly hopeful that he is going to succeed and comply and successfully complete based on what he's done in the past. [Lyons] has already been through a program . . . [t]hat apparently did not work in getting him to curb his behavior that is continuing in this case . . . ."

The court then asked for the probation department's position on the sentencing/probation issues. The probation officer responded that several probation conditions had not been marked on the form before the court, and asked the court to include these conditions in its final probation order. Those omitted conditions included: (1) a prohibition on using or possessing alcohol if directed by the probation department; (2) a prohibition against the use of controlled substances without a prescription; and (3) the requirement that Lyons submit to requested drug and/or alcohol testing. The probation officer noted these are "common supervision tool[s]," and the alcoholic beverages condition was included to ensure Lyons was not using alcohol in excess.

After stating it would incorporate these conditions into the final order, the court announced its ruling. The court said it was suspending the imposition of sentence; imposing formal probation for three years with 365 days' local custody; and imposing all recommended probation conditions including the drug and alcohol use/testing conditions that had been initially left blank. On the Fourth Amendment waiver condition, the court said it was overruling Lyons's objection "for the reasons articulated in the case previously referenced" which included "probation's need to completely supervise and properly supervise the defendant." The court also discussed its "particularized finding" as to Lyons:

> "[Lyons] not only has this conduct and several priors for the same conduct, he also has priors for theft related offenses. He is a [Penal Code section] 290 registrant, he does have a history involving substances. For all these reasons, it's appropriate that probation not be restricted from proper supervision by having areas that are off limits to them to ensure that the defendant is remaining law abiding and complying with their terms and conditions, including specifically but not limited to probation knowing where the defendant is working and living, no contact with the victim, no use of controlled substances, remaining law abiding, as examples of the specific order, probation will need to have unrestricted access."

After the court made these statements, defense counsel said: "[F]or clarification, in the probation report it indicates he does not have a drug or alcohol problem," citing to the portion of the probation report in which Lyons acknowledged he drank alcohol, but denied he had an alcohol problem. Defense counsel also noted that Lyons had not used his electronic devices in committing any of his criminal offenses, and his medication is only for health conditions and has been prescribed. The probation officer replied that

"probation is recommending the alcohol and drug conditions due to his admission of taking medication and to ensure that he maintain his sobriety when out of custody."

The court responded that it agreed with the defense counsel's clarifications and would impose the Fourth Amendment search-waiver condition "[f]or the other reasons stated."

DISCUSSION

On appeal, Lyons challenges: (1) the portion of the Fourth Amendment search waiver condition that pertains to his electronics; (2) the prohibition against using or possessing alcohol if directed by his probation officer; and (3) the requirement that he submit to requested alcohol and/or drug testing.

I. *Legal Principles Applicable to Probation Condition Challenges*

Probation is not a right, but an act of leniency that allows a defendant to avoid imprisonment. (*People v. Moran* (2016) 1 Cal.5th 398, 402.) When an offender avoids incarceration by accepting probation, state law authorizes the sentencing court to impose conditions that are "fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer . . . ." (Pen. Code, § 1203.1, subd. (j).) Under this code section, "courts have broad discretion to impose [probation] conditions to foster rehabilitation and to protect public safety . . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*).)

But this broad discretion "is not without limits." (*Carbajal*, *supra*, 10 Cal.4th at p. 1121.) "[A] condition of probation must serve a purpose specified in the statute," and

conditions regulating noncriminal conduct must be " 'reasonably related to the crime of which the defendant was convicted or to future criminality.' " (*Ibid.*) In *Lent*, the California Supreme Court held a probation condition is "invalid" under this standard *only* if the condition " '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Lent*, *supra*, 15 Cal.3d at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) We review the reasonableness of a probation condition for abuse of discretion. (*Ibid.*)

Additionally, " '[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as constitutionally overbroad.' [Citation.] 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) We review "constitutional challenges to probation conditions de novo." (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*).)

II. *Electronics-search Condition*[1]

A. *Reasonableness Under* Lent *Standard*

Lyons contends the court abused its discretion by requiring that he waive his Fourth Amendment rights as to his electronics ("computers" and "recordable media"). He says this portion of the probation condition is unreasonable under the *Lent* test.

The parties agree the electronics-search condition has no relationship to Lyons's indecent-exposure crime and the condition relates to conduct that is not criminal. Therefore, the main issue is whether the condition is "reasonably related to future criminality" (the third *Lent* factor). (*Lent*, *supra*, 15 Cal.3d at p. 486.) After *Lent*, the California Supreme Court clarified that a probation condition "that enables a probation officer to supervise his or her charges effectively *is* . . . 'reasonably related to future criminality.' " (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381, italics added; accord, *In re P.O.* (2016) 246 Cal.App.4th 288, 295 (*P.O.*).) Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the

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1 Numerous cases addressing the propriety of an electronics-search probation condition are currently pending review in the California Supreme Court. (See *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628 (*J.E.*); *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210 (*Nachbar*); *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937.)

probation officer in supervising the probationer and promoting his or her rehabilitation. (*Olguin*, at pp. 380-381; *People v. Balestra* (1999) 76 Cal.App.4th 57, 67 (*Balestra*); *Trujillo, supra*, 15 Cal.App.5th at pp. 582-586.) "This is true 'even if [the] condition . . . has no relationship to the crime of which a defendant was convicted.' " (*P.O.*, at p. 295, quoting *Olguin*, at p. 380.)

The facts show the electronics-search condition is reasonably related to preventing Lyons's future criminality because it permits the probation department to effectively supervise him. Lyons has a lengthy criminal history, and a moderate to high risk of reoffending. Although he had completed counseling programs and many of his prior offenses occurred long ago, Lyons continued to reoffend and was required to register as a sex offender under Penal Code section 290. The court found that under these particular circumstances, the probation department should have the ability to search Lyons's electronics without cause to ensure he is remaining law abiding and complying with the probation terms, including to obtain information about "where the defendant is working and living" and any continuing contact with the female victim.

The court did not abuse its discretion. If this repeat offender is permitted to avoid prison through probation despite his continuing felony sex offenses, the court has the authority to take all steps necessary to promote Lyons's rehabilitation and ensure public safety objectives are satisfied. The trial court had a reasonable basis to conclude that permitting the probation officer to inspect Lyons's electronics will be an effective tool in supervising Lyons, rather than relying solely on meetings, telephone conversations, or physical searches of any residence (the record suggests that Lyons may be homeless

when released from jail). The court made the factual determination that providing the probation department with the discretion to search Lyons's electronics will promote the department's effectiveness in supervising and monitoring Lyons's conduct. Under *Lent* and *Olguin*, the court acted within its discretion in reaching this conclusion. (See *Trujillo, supra*, 15 Cal.App.5th at pp. 582-586.)

We reject Lyons's contention the third *Lent* factor is implicated unless there are specific facts showing a "nexus" between the electronic devices and the crime and/or between the electronic devices and the purposes of probation. As we explained in *Trujillo*, there is no litmus test requiring a particular factual showing before a court can rationally find the probation condition is reasonably related to preventing a defendant's future criminality. (*Trujillo, supra*, 15 Cal.App.5th at pp. 584-586.) Lyons supports his argument with *People v. Burton* (1981) 117 Cal.App.3d 382. However, as we explained in *Trujillo*, *Burton*'s reasoning is no longer viable in light of *Olguin* and *Balestra*. (*Olguin, supra*, 45 Cal.4th at p. 381; *Balestra, supra*, 76 Cal.App.4th at pp. 66, 68; see *Trujillo*, at pp. 585-586.)

B. *Constitutional Overbreadth Challenge*

Lyons alternatively contends the electronics-search condition is unconstitutionally overbroad because it violates his fundamental privacy rights identified in *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473] (*Riley*) and is not narrowly tailored to serve the state's interest in reformation and rehabilitation.

In *Riley*, the United States Supreme Court rejected the government's argument that law enforcement may, without a warrant, search a cell phone seized from an arrested

individual. (*Riley*, *supra*, 134 S.Ct. at p. 2485.) In reaching this conclusion, the court discussed the fact that a modern cell phone can hold an immense amount of confidential information, including past and current medical records, past and current financial records, Internet searches involving highly personal issues, personal diaries, photographs, and intimate correspondence. (*Id.* at pp. 2489-2491.) The court balanced the strong privacy intrusion arising from a search of this type of information against the law enforcement justifications for dispensing with the warrant requirement, and found the arrestee's privacy concerns outweighed the law enforcement justifications. (*Id.* at pp. 2485-2493.) But the court made clear it was not holding "a cell phone is immune from search," and recognized its ruling would not necessarily extend in other situations in which law enforcement needs are stronger. (*Id.* at pp. 2493-2494.) Reflecting the limited nature of its holding, the court stated: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is . . . simple—get a warrant." (*Id.* at p. 2495.)

Relying on *Riley*, the Court of Appeal in *Appleton* concluded an electronics-search condition was constitutionally overbroad because it would allow the search of "vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality," and remanded for the trial court to fashion a more narrowly tailored electronics-search condition. (*Appleton*, *supra*, 245 Cal.App.4th at pp. 724-727; accord, *P.O.*, *supra*, 246 Cal.App.4th at pp. 297-298.) Several months later, another Court of Appeal reached a different conclusion, and upheld an electronics-search condition against a constitutional overbreadth claim. (*J.E.*, *supra*, 1 Cal.App.5th at pp.

803-807.) The *J.E.* court emphasized the probationer's reduced privacy rights, the need for "intensive supervision," and the absence of any evidence showing the probationer's electronics contained the type of sensitive information identified in *Riley*. (*J.E.*, at pp. 804-807.)

In two recent decisions, this court agreed with the *J.E.* court and found *Appleton*'s analysis unpersuasive. (*Trujillo*, *supra*, 15 Cal.App.5th at pp. 587-589; *Nachbar*, *supra*, 3 Cal.App.5th at pp. 1128-1130.) We explained that although computers and cell phones can contain highly personal information, the overbreadth analysis is materially different from the warrant requirement at issue in *Riley*. (*Trujillo*, at pp. 587-589; *Nachbar*, at p. 1129.) Both *J.E.* and *Nachbar* are currently before the California Supreme Court, as are many other Court of Appeal decisions addressing the same issue, some of which have invalidated electronics-search conditions and others of which have upheld the conditions. (See fn. 1, *ante*.) Pending any contrary guidance from the California Supreme Court, we will continue to follow the principles set forth in *Trujillo* and *Nachbar* on the constitutional overbreadth issue. As explained in those decisions, although *Riley*'s description of the general privacy concerns pertaining to cell phones certainly informs our decisionmaking, *Riley's* ultimate conclusion regarding the need for a warrant does not apply in the probation condition context absent particularized facts not present here.

First, a probationer does not " 'enjoy "the absolute liberty to which every citizen is entitled." ' " (*United States v. Knights* (2001) 534 U.S. 112, 119.) "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting

probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*Ibid.*)

Second, although electronic devices can store a wealth of private information and are entitled to strong safeguards from governmental interference, a person's home also contains considerable confidential information and is a place in which a person has the absolute right to be "left alone," and thus has long been provided the highest level of protection from governmental interference. (See *Riley*, *supra*, 134 S.Ct. at p. 2494 ["[o]pposition to [unrestrained] searches [of homes] was . . . one of the driving forces behind the [American] Revolution itself"]; *United States Department of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487, 501 [the home "is accorded special consideration in our [federal] Constitution, laws, and traditions"]; *United States v. United States District Court* (1972) 407 U.S. 297, 313 ["physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"]; *Rowan v. United States Post Office Dept.* (1970) 397 U.S. 728, 737 ["The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality,"].) Yet courts routinely uphold probation conditions granting probation officers broad authority to search a probationer's residence without a warrant or reasonable cause. (See *People v. Ramos* (2004) 34 Cal.4th 494, 505-506; *Balestra*, *supra*, 76 Cal.App.4th at pp. 66-68; *In re Binh L.* (1992) 5 Cal.App.4th 194, 203-205.) In this case, Lyons does not challenge the probation condition providing the officers with the authority to conduct random and unlimited searches of his residence at any time and for no stated reason.

Third, the state's need to supervise a convicted criminal is different from the objectives of the arresting officer in *Riley*. In contrast with the United States Supreme Court's somewhat critical view of law enforcement's perceived need to routinely search an arrestee's cell phone without waiting for a warrant (see *Riley*, *supra*, 134 S.Ct. at pp. 2485-2488), the probation department articulated persuasive grounds for seeking permission to conduct warrantless searches of Lyons's electronics. As defense counsel acknowledged during oral argument, it would be relevant to the probation department's supervisory function to conduct random searches of Lyons's electronics to determine whether he is viewing inappropriate pornographic material and/or to examine the electronic information to determine Lyons's residential status if he moves and fails to inform the department. Because the probation department will need to monitor Lyons with respect to these and other risk factors (e.g., his cognitive behavior, social isolation, and leisure and recreation activities), a routine search of his electronic data is an important means of imposing the level of supervision required to protect public safety and prevent future criminality, as an alternative to prison. Even when a governmental action constitutes a serious invasion of privacy rights, the action may be justified if it "substantially furthers one or more legitimate competing or countervailing [governmental] interests . . . ." (*In re Christopher M.* (2005) 127 Cal.App.4th 684, 695, disapproved on another ground in *People v. Gonzales* (2013) 56 Cal.4th 353, 375, fn. 6.)

Fourth, to the extent other appellate courts have found merit to constitutional overbreadth challenges and have remanded for the court to narrow the condition (see, e.g., *Appleton*, *supra*, 245 Cal.App.4th at pp. 724-727; *P.O.*, *supra*, 246 Cal.App.4th at

pp. 297-298), we are reviewing Lyons's *as-applied* constitutional challenge and therefore we are required to focus on the particular facts of this case, rather than uncritically follow conclusions of other courts considering different factual circumstances. (See *Trujillo, supra,* 15 Cal.App.5th at pp. 588-589; *People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1378.) The record here does not contain information to support the need for a more narrowly tailored condition. Most important, there are no facts showing Lyons uses his electronic devices to hold the type of sensitive medical, financial, or personal information described in *Riley* and *Appleton*. During oral argument, Lyons's counsel was unable to identify any particular category of private information *contained on Lyons's electronics* that should be off-limits to a probation officer, and she acknowledged that Lyons does not appear to have a "smart phone," which is the type of instrument that the United States Supreme Court described as having a "broad range of . . . functions based on advanced computing capacity, large storage capacity and Internet connectivity." (*Riley*, *supra*, 134 S.Ct. at p. 2480.) Additionally, there are no facts in the record showing a search of Lyons's electronics would be any more invasive than an unannounced, without-cause, warrantless search of his residence, a highly-intrusive condition he has not challenged on appeal. Absent particularized facts showing the electronics-search condition will infringe on Lyons's heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly-drawn condition. As in *Trujillo*, and unlike in *Appleton* and *P.O.*, there is nothing in the record showing that there would be any particular information on Lyons's electronics that requires protection from the government because it is more private than

items in Lyons's residence. As the record stands now, there is no reasoned basis for more narrowly tailoring the search condition. Additionally, any concerns regarding the potential invasiveness of the electronics-search condition are ameliorated by the restriction against arbitrary, capricious, or harassing probation searches. (See *People v. Woods* (1999) 21 Cal.4th 668, 682; *People v. Cervantes* (2002) 103 Cal.App.4th 1404, 1408.)

II. *Alcohol Condition*

Lyons next contends the court abused its discretion under *Lent* by imposing the probation condition prohibiting him from "us[ing] or possess[ing] alcohol if directed by the [probation officer]."

Lyons forfeited this argument by failing to raise it in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235 (*Welch*).) Although defense counsel corrected the record during the sentencing hearing to note that there was no evidence in the probation report that Lyons had alcohol issues, counsel made this comment solely in response to the court's explanation for its ruling on the electronics-search condition. The court agreed with defense counsel's correction, but adhered to its ruling on the electronics-search condition based on "the other reasons stated."

Fairly read, defense counsel's clarification cannot be construed as a request to strike the alcohol-prohibition condition. Lyons did not provide the court with the opportunity to consider and rule on the challenge to the alcohol-prohibition condition, and thus he cannot raise it here for the first time. (See *People v. Stapleton* (2017) 9 Cal.App.5th 989, 994.) "A timely objection allows the court to modify or delete an

allegedly unreasonable condition or to explain why it is necessary in the particular case. . . . A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis." (*Welch*, *supra*, 5 Cal.4th at p. 235.)

Additionally, Lyons's challenge fails on its merits. Although alcohol is not criminal and there was no evidence Lyons was under the influence of alcohol when he committed the current crime, the court did not abuse its discretion in concluding the condition was reasonably related to preventing future criminality. (See *Olguin*, *supra*, 45 Cal.4th at pp. 380-381; *Lent*, *supra*, 15 Cal.3d at p. 486.)

Lyons's current crime and criminal history reflects his inability to control himself, particularly in the presence of young females in public places. Courts have recognized that alcohol use is accompanied by a "a lessening of internalized self-control" and that alcohol consumption impairs judgment and is not "conducive to controlled behavior." (*People v. Smith* (1983) 145 Cal.App.3d 1032, 1034-1035, fns. omitted; see *State v. Wardle* (Idaho 2002) 53 P.3d 1227.) Lyons is a repeat offender and admits he drinks alcohol. He has continued to engage in deviant behavior, has very poor judgment, and has no insight into the impact his criminal conduct has on others. The probation report reflects that Lyons is likely to reoffend without close supervision and a detailed case plan. Although he has expressed a desire to reform, there is no information in the record that he has the tools to do so.

On this record, providing the probation department with the discretion to require abstinence from alcohol consumption was reasonably calculated to aid in preventing

Lyons from committing another sex offense, and thus the court's imposition of the condition was within its broad discretionary authority. The trial court (with the prosecutor's agreement) gave Lyons the benefit of the doubt by suspending his prison sentence. But the court was not required to tie the probation department's hands in its supervisory function by refusing to provide it with the discretion to direct Lyons not to use or possess alcohol if, for example, alcohol appears to be a trigger for Lyons's future criminality. Applicable law does not require us to so narrowly construe the court's powers.

In his appellate briefs, Lyons also challenged the condition that he not use controlled substances without a prescription. During oral argument, Lyons's counsel withdrew this contention, acknowledging that using controlled substances without a prescription is criminal conduct, and therefore the condition was reasonable under the *Lent* test. We agree with this position, and accept the withdrawal of the contention.

III. *Drug and Alcohol Testing Conditions*

Lyons additionally challenges the conditions permitting drug and alcohol testing. He argues the conditions are unreasonable and are unconstitutionally overbroad as they invade his constitutional right to privacy and are not narrowly tailored to a legitimate governmental interest. These conditions stated: (1) "Submit to any chemical test of blood, breath, or urine to determine blood alcohol content and authorize release of results to [the probation officer] or the court whenever requested by the [probation officer], a law enforcement officer, or the court ordered treatment program"; and (2) "Do not knowingly use or possess any controlled substance without a valid prescription and

submit a valid sample for testing for the use of controlled substances/alcohol when required by the [probation officer], law enforcement officer, or treatment provider."

Lyons forfeited this argument by failing to raise it in the court below. Because this challenge requires a fact-based inquiry, Lyons was required to assert it in the trial court to provide the court with the opportunity to scrutinize the individual facts and circumstances pertaining to the testing requirements. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 886-887, 889.)

Even if Lyons had properly preserved the issue, the argument is without merit. First the drug/alcohol testing requirements are reasonable under *Lent* because they relate to the enforcement of other probation conditions prohibiting the use of illegal drugs and/or alcohol (at the discretion of the probation officer). Additionally, although a drug or alcohol test implicates constitutionally protected privacy interests, it is permissible if reasonable under the circumstances. (*In re Kacy S.* (1998) 68 Cal.App.4th 704, 710-711.) The reasonableness of drug or alcohol tests " ' "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' " (*Id.* at p. 710.) Here, we have found the court properly imposed the alcohol/illegal-drug use prohibitions, and thus the government had a strong interest in testing Lyons to determine whether he was complying with these conditions. The government legitimately sought to monitor Lyons's compliance with the drug/alcohol prohibitions to promote Lyons's chances of a successful rehabilitation and to deter continued criminal conduct. (See *People v. Balestra*, *supra*, 76 Cal.App.4th at pp. 62, 68-69.)

By contrast, as a probationer, Lyons's expectations of privacy are diminished substantially. (See *People v. Adams* (2004) 115 Cal.App.4th 243, 258 ["convicted criminals do not enjoy the same expectation of privacy that nonconvicts do"]; see also *People v. Reyes* (1998) 19 Cal.4th 743, 753; *People v. Bravo* (1987) 43 Cal.3d 600, 608-609; *In re Kacy S., supra,* 68 Cal.App.4th at pp. 710-711.) Contrary to Lyons's argument, the fact there may be less intrusive ways of monitoring his drug and/or alcohol use (e.g., physical searches or observations) did not prohibit the court from providing the probation department with the most effective means to do so.

DISPOSITION

Judgment affirmed.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.